FILE COPY

FILED
MAY 21 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 55

A. E. McDONALD,

Petitioner,

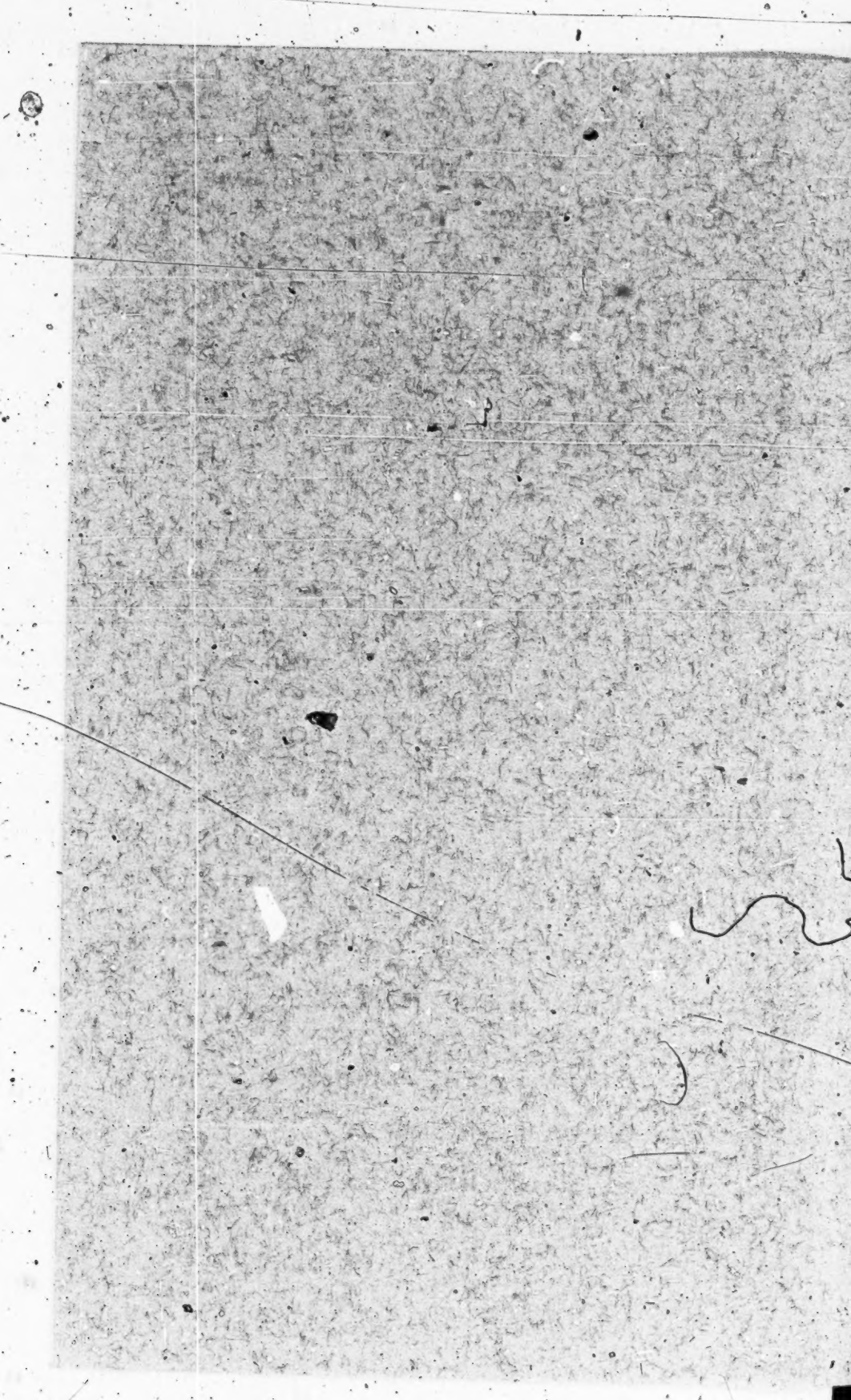
vs.

ERNEST O. THOMPSON ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. S. CHRISTOPHER,
LLOYD E. PRICE,
Counsel for Petitioner.

LYNN B. GRIFFITH,
PRICE AND CHRISTOPHER,
Of Counsel.



INDEX.

Subject Index.

	Page
Petition for writ	1
Summary of statement of matters involved	1
Reasons relied on for allowance of writ	6
Prayer and signatures	9
Brief	11
Opinions of courts below	11
Jurisdiction, grounds for	11
Statement of case	16
Specifications of error	16
Argument, summary of	21
Points A & B	22
Points C & D	57

Table of Cases.

Atlantic Coast Line Ry. Co. v. *Hampton*, 80 Fed. Supp. 797	63
Barnwell Bros. v. *South Carolina State Highway* Comm. (not reported)	35, 61
Bowman v. *Chicago & N. W. Ry. Co.*, 124 U. S. 465, 8 Sup. Ct. 689	8, 15, 41
Buck v. *Kuykendall*, 267 U. S. 307, 45 Sup. Ct. 324	29
Bush v. *Malloy*, 45 Sup. Ct. 327	8, 15, 29, 43
Chicago, R. I. & Pacific Ry. Co. v. *Hardwicke Farmers Elev. Co.*, 226 U. S. 426, 33 Sup. Ct. 176	8, 15, 44
Dancigar Oil & Rfg. Co. v. *Railroad Comm. of Texas*, 49 S. W. (2d) 837	54
Erie Railroad Co. v. *New York*, 233 U. S. 671, 34 Sup. Ct. 759	8, 9, 15, 44
Freight Rate Taxing Cases, 15 Wall. 232	8, 37
Galveston Truck Lines v. *Allen*, 289 U. S. 708, 53 Sup. Ct. 694, 2 Fed. Supp. 488	54, 56
Gibbons v. *Ogden*, 22 Sup. Ct. 1, 9 Wheat. 23	8, 15
Gillman v. *Philadelphia*, 3 Wall. 713	8, 15, 41
Golloch, Moe, Extension of Operations, 1 MCC 161	50

Page

Great Northern Ry. v. *Merchants Elev. Co.* 63
Hannibal & St. Joseph R. R. Co. v. *Husen*, 95 U. S. 527, 5 Otto 465 57
Harris v. *Municipal Gas Co.*, 59 S. W. (2d) 355 54
Hi-Ball Transit Co. v. *Railroad Comm.*, 22 F. (2d) 425 43
International Shoe Co. v. *Pinkus*, 278 U. S. 261 9, 15, 48
Kelley v. *State of Washington*, 58 Sup. Ct. 87 36
M., K. & T. v. *Harris*, 234 U. S. 417, 34 Sup. Ct. 792 9, 15, 44
McCulloch v. *State of Maryland*, 4 Wheat. 431 27
Michigan Public Utilities Comm. v. *Duke*, 266 U. S. 570 54
Missouri-Pacific v. *Porter*, 273 U. S. 341, 47 Sup. Ct. 383 9, 15, 48
Morris v. *Duby*, 274 U. S. 143, 71 L. Ed. 966 29
Northern Pacific Ry. Co. v. *Washington*, 222 U. S. 370 8, 15, 43, 46
Passenger Cases, 7 Howard 283 25
Prigg v. *Pennsylvania*, 41 U. S. 535, 16 Peters 539 9, 15, 44
Railroad Comm. v. *Bates*, 108 S. W. (2d) 283 7, 15, 33
Railroad Comm. v. *McDonald*, 90 S. W. (2d) 981 23
Railroad Commission v. *MacMillan*, 51 F. (2d) 400 54
Railroad Commission v. *Shupee*, 57 S. W. (2d) 295 50
Sage v. *Baldwin*, 55 F. (2d) 968 53
Seaboard Air Line Ry. Co. v. *Wells*, 100 Fla. 1631, 131 So. 777 50
Slagle, In re, 2 MCC 127 63
Smith v. *Cahoon*, 75 L. Ed. 1264 54
Smith v. *Alabama*, 124 U. S. 466, 8 Sup. Ct. 564 9, 15, 45
Southern Ry. Co. v. *Railroad Commission of Ind.*, 236 U. S. 439, 35 Sup. Ct. 304 9, 15, 45
Southwestern Greyhound Lines, Inc., v. *Railroad Comm. of Texas* 7, 13, 15, 17, 59
Sproles v. *Binford*, 286 U. S. 374, 52 Sup. Ct. 581 13, 30
Stephenson v. *Binford*, 287 U. S. 251, 53 Sup. Ct. 181 13, 15, 30
State ex rel. R. C. Motor Lines v. *Fla. Railroad Comm.*, 123 Fla. 34, 166 So. 840 7, 8, 15, 62
State ex rel. L. & L. Freight Lines v. *Douglass*, 169 So. 389 7, 15

Page

State v. *Sugarland*, 163 S. W. (2d) 1047 54
Thompson, Ernest O. et al. v. *McDonald*, Circuit Ct. App. New Orleans (not yet reported) 5
Washington-Oregon Co. v. *State of Washington*, 270 U. S. 87, 46 Sup. Ct. 279 ..... 9, 15, 46

STATUTES CITED.

Motor Carrier Act, 1935, U. S. C. A., Title 28 ..... 1, 3, 4
Motor Truck Law (of Texas), Art. 911b, Vernon's Ann. Civ. St., p. 480 ..... 2, 13, 54, 55
Texas Statutes, Penal Code, Art. 3 ..... 54, 55
Texas Statutes, 1 Code Crim. Procedure, 1925, Art. 396 56

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD,

Petitioner,

vs.

ERNEST O. THOMPSON ET AL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of A. E. McDonald respectfully shows to this Honorable Court:

I.

Summary Statement of the Matters Involved.

Petitioner is a common carrier motor carrier, having been engaged in such business since long prior to passage of Motor Carrier Act, 1935 (R. 4-23-35).

Respondents are the Railroad Commission of Texas and its law enforcement officers (R. 2).

On June 1, 1935 and prior thereto petitioner was operating over Federal Highways Nos. 75, 77, 80, 81, 90, 281, and 290 (R. 36) within the State of Texas, exclusively in interstate commerce (R. 5-35) and has continuously so engaged since said date.

Motor Carrier Act, 1935, was approved by the President of the United States August 9, 1935, under the so-called "Grandfather" provision of which (Section 206a) petitioner was and is entitled to a certificate of convenience and necessity as a matter of right upon filing application and proof of operation on June 1, 1935 and continuously since. Application was filed as required by Act (R. 36). Petitioner had met all requirements of Federal Act to date of trial in District Court (R. 36) and all requirements of State law (Art. 911b, Vernon's Annotated Civil Statutes, 1925) except the requirement that he have a so-called "State Interstate Certificate of Convenience and Necessity" (R. 36-37).

The Texas Legislature passed in 1931 what we commonly refer to as the "Motor Carrier Truck Law" (Acts 1931, 42nd Leg., p. 480, Ch. 277; Art. 911b, Vernon's Annotated Civil Statutes of Texas, 1925) making no distinction in its application to intra and interstate commerce. The only applicable provision of the Texas Act requiring a "certificate of convenience and necessity," in part, follows:

> "Section 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity *pursuant to a finding to the effect that the public convenience and necessity require such operation.*" etc.

This is the certificate which respondents say petitioner must have and which petitioner does not even claim to have.

Petitioner says he never did have to have any such certificate but that if he did that then the Federal Motor Carrier Act, 1935, superseded that part of the Texas Act requiring certificates or permits to operate exclusively in interstate commerce.

This case does not involve an appeal from, nor an attack on, an order of the Railroad Commission.

Petitioner, operating a common carrier truck line had, January 16, 1936, a truck loaded with interstate freight opped by respondents at or near Conroe, Texas, and his iver arrested and thrown in jail because he did not hold state interstate certificate of convenience and necessity. 140-142). Respondents issued orders to all Commission spectors to arrest all of petitioner's drivers and to stop titioner's operations (R. 8-9-140). Respondent Hood dered petitioner to cease operation (R. 140).

Petitioner, alleging the foregoing facts, applied to the ederal District Court for the Northern District of Texas, ting at Fort Worth, for injunctive relief upon further egation that petitioner had complied and was complying th all applicable laws of the State of Texas (R. 9-37); that y requirement of the Texas Act as to certificates or per- ts to operate in interstate commerce had been superseded the Motor Carrier Act, 1935, and that the acts of respond- ts complained of were unlawful and constituted an inva- on of your petitioners rights under the laws and Consti- tion of the United States in the following particulars (R. -16):

(a) Destroyed petitioner's valuable rights of property der the Commerce Clause of the Constitution.

(b) Deprived your petitioner of his property and rights valuable property guaranteed under the Due Process ause of the 14th Amendment.

Respondents demurred to the Bill of Complaint asserting effect that they still retained the power to require of an clusively interstate motor carrier that he obtain a "cer- cate of convenience and necessity," in spite of the Motor rrier Act, 1935 (R. 21).

Respondents then answered and admitted and "allege the fact to be, that complainant (your petitioner here) for several years prior and subsequent to June 1, 1933, has been transporting commodities between various points within the State of Texas" (R. 23), over the highways as alleged in the bill of complaint. Respondents offered no evidence whatsoever except that your petitioner had no certificate of convenience and necessity and had operated under a permanent injunction granted by a District Court of Travis County, Texas, which had been dissolved by the Third Court of Civil Appeals of Texas (R. 152-153) and the testimony of a witness about the physical condition of the highways of Texas (R. 153) in support of their contention that the Railroad Commission could still require an interstate common carrier to obtain a certificate or permit (R. 29; Respondents' Answer, paragraph IX).

There is no dispute as to the facts. The whole controversy in this case is:

(1) Can the State of Texas burden and regulate interstate commerce under its Motor Carrier Truck Law by requiring interstate certificates or permits of exclusively interstate common carriers, since, and while the Interstate Commerce Commission is authorized to regulate it under the Federal Motor Carrier Act, 1935?

(2) Is the regulation of interstate commerce by carriers using the highways a joint regulation by the states and the Federal Government so far as certificates of authority are concerned; and if so when did the states acquire authority to regulate interstate commerce?

(3) Would not the authority contended for by respondents be a direct regulation of interstate commerce?

(4) In respect of the granting of certificate of convenience and necessity, did the Motor Carrier Act, 1935, supersede the Texas Motor Truck Law; or is there a divided

authority whereby a carrier has to obtain certificate both from the Interstate Commerce Commission and from the State Commissions before he can operate?

Your petitioner asserts that the Motor Carrier Act, 1935, superseded the State Act in respect of these matters. That there can be no divided authority in such matters either constitutionally or practically. That the authority claimed by respondents is a direct regulation of and burden upon interstate commerce.

The Honorable Fifth Circuit Court of Appeals says in effect, if not in so many words, that a motor carrier must get a certificate of convenience and necessity from the Interstate Commerce Commission and then go to the State Commissions and say to such Commission, I have here now my Federal certificate, pray Sirs, may I use your highways, and if the State Commission says "No", there interstate commerce must stop; that there is a joint and dual regulation imposed, each of which would, we suppose, supplement the other.

Section 206a Motor Carrier Act, 1935, in its so-called grandfather provision directly granted to petitioner under the undisputed facts of this case, a certificate of convenience and necessity authorizing operation during the pendency of his application. Can the Railroad Commission of Texas deprive him of that direct grant? Can the State, much less the Railroad Commission, grant or refuse certificates of convenience and necessity to operate exclusively in interstate commerce while Congress is exercising that power under the Constitution? The trial court did not think so and permanently enjoined the respondents (R. 33).

Yet the Circuit Court of Appeals, Fifth Circuit, in its opinion, dated April 12, 1938, says:

> "Moreover, said Act does not provide that every person who shall receive a certificate of public convenience

and necessity *shall be entitled to the use of the various highways of the state,* but the said Act prohibits anyone engaging in interstate commerce until he receives such certificate from the Interstate Commerce Commission. The Interstate Commerce Commission under the Act has the power and exclusive authority to pass upon such applications and to refuse them. If it should refuse one, then such applicant would not be permitted to engage in interstate commerce. This is made clear by the Act. That provision, however, is not in direct conflict with the provisions of the Motor Truck Laws of the State of Texas which require the Railroad Commission of the State of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be endangered if there is an excessive amount of traffic on the highways. *The determination of that question has been left to the states.*" (Emphasis ours.)

Can this be so? That is the controversy here in 1938.

Reasons Relied on for Allowance of the Writ.

Your petitioner is entitled to his certificate of convenience and necessity from the Interstate Commerce Commission under Sec. 206a, Motor Carrier Act, 1935, as a matter of law and as of right under the undisputed facts found by the trial court (R. 35-36; court's findings Nos. 5, 8, 9, 10, 11, and 12); as well as under the Interstate Commerce Commission decision in the *Slagle* case, 2 M. C. C. 127; and the decision of the Circuit Court of Appeals deprives petitioner of valuable properties and rights of property and construes the Motor Carrier Act, 1935, inconsistently with and contrary to the Commerce Clause of the Constitution.

The action of the Circuit Court of Appeals is contrary to and violative of the rights guaranteed to petitioner under the 14th Amendment to the Constitution of the United States and permits the respondents to take or destroy valuable property rights without compensation.

There can be no dual authority to regulate interstate commerce carried on by motor carriers such that a carrier must first obtain a certificate of convenience and necessity from the Interstate Commerce Commission and then plead with the States for permission to use the highways of the States as the Circuit Court of Appeals has held. Such a holding would destroy Federal regulation and permit the States to directly regulate interstate commerce. Congress has occupied that field, preempted to it by the Constitution of the United States, and whatever may be the incidental effect of State regulation upon interstate commerce, the power and authority to grant certificates of convenience and necessity authorizing the use of the highways is now vested exclusively in the Interstate Commerce Commission.

The interpretation which the Circuit Court of Appeals has placed on the Motor Carrier Act, 1935, defeats the Commerce Clause of the Constitution. The interpretation which said court puts on the Texas Motor Truck Law makes that Act operate as a direct regulation of interstate commerce in violation of the Commerce Clause of the Constitution, and therefore unconstitutional, all in violation of the rights guaranteed to your petitioner under the Constitution.

The Circuit Court has construed the Texas Motor Truck Law contrary to the construction placed upon it by the Supreme Court of Texas in *Southwestern Greyhound Lines, Inc.*, v. *Railroad Commission of Texas et al.*, 99 S. W. (2d) 268, and contrary to the Third Court of Civil Appeals of Texas in *Railroad Commission et. al.* v. *Bates*, 108 S. W. (2d) 283, in cases involving the same question of law as is here involved.

The Circuit Court has in this case decided the same question of law contrary to the Supreme Court of Florida in *State ex rel. L. & L. Freight Lines* v. *Douglass*, 169 So. 389, and in *State ex rel. R. C. Motor Lines* v. *Florida Railroad*

Commission, 123 Fla. 345, 166 So. 840, the courts of each State saying that the State commissions, after grant to a carrier of a Federal certificate, must give such carrier a certificate "as a matter of right," this being no more than a State registration for the purpose of enabling a State "to enforce against the interstate operation all of the police regulations" and such regulations extend only to weight, speed, load, lights, brakes, and similar regulation.

The two next preceding paragraphs demonstrate, first, that the Circuit Court has decided an important question of local law contrary to the decisions of our State courts and has applied Texas law to a situation that brings that law within the inhibitions of the Constitution of the United States; and, second, that the Circuit Court has decided a vastly important question of Federal law which has not but ought to be decided by this Court, and more especially since the decision of the Circuit Court in this case nullifies effective regulation by the Federal Government of interstate commerce by motor carrier and abrogates the Commerce Clause of the Federal Constitution; and, third, that the opinion and judgment in this case is contrary to the weight of authority.

The opinion and judgment of the Fifth Circuit Court in this case is destructive of the civil rights and rights of property of your petitioner as guaranteed under the Constitution in a decision of general law which is untenable and in conflict with the great weight of authority, and in conflict with the decisions of this Court in *Gibbons* v. *Ogden*, 22 Sup. Ct. 1, 9 Wheat. 23; *Passenger Cases*, 7 Howard 283; *Freight Rate Taxing Cases*, 15 Wall. 232; *Gillman* v. *Philadelphia*, 3 Wall. 713; *Bowman* v. *C. & N. W. Ry. Co.*, 124 U. S. 465, 8 Sup. Ct. 689; *Bush* v. *Malloy*, 45 Sup. Ct. 327; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 176; *Erie Railroad*

Co. v. *New York,* 233 U. S. 671, 34 Sup. Ct. 759; *M. K. & T.* v. *Harris,* 234 U. S. 417, 34 Sup. Ct. 792; *Prigg* v. *Pennsylvania,* 41 U. S. 535, 16 Peters 539; *Smith* v. *Alabama,* 124 U. S. 466, 8 Sup. Ct. 564; *Southern Railway Co.* v. *Railroad Commission of Indiana,* 236 U. S. 439, 35 Sup. Ct. 304; *Washington-Oregon Co.* v. *State of Washington,* 270 U. S. 87, 46 Sup. Ct. 279; *Missouri Pacific* v. *Porter,* 273 U. S. 341, 47 Sup. Ct. 383; *International Shoe Co.* v. *Pinkus,* 278 U. S. 261.

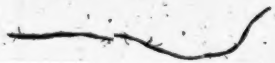
Prayer.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Fifth Circuit Court of Appeals, had in the case numbered and entitled on its docket, No. 8286, Ernest O. Thompson *et al.*, appellants, *vs.* A. E. McDonald, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Fifth Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 14th day of May, 1938.

A. E. MCDONALD,
By T. S. CHRISTOPHER,
Counsel for Petitioner.

PRICE & CHRISTOPHER,
LLOYD E. PRICE,
Of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD, *Petitioner,*

vs.

ERNEST O. THOMPSON ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

Judgment was rendered in the trial court, Federal Dis-rict Court, Northern District of Texas, Fort Worth, with-ut written opinion; however, the trial court's findings of act and conclusions of law (R. 34 to 38) and its judgment R. 42) are in the transcript.

The opinion of the Circuit Court of Appeals is not yet eported but was entered April 12, 1938, and may be found the record beginning at page 159

Jurisdiction.

(1) Jurisdiction of this cause is conferred upon this onorable Court by *Judicial Code,* Section 240(a), as nended; United States Code Annotated, Title 28, Section 47(a).

(2) The date of the judgment of the Circuit Court of Appeals, Fifth Circuit, is April 12, 1938 (R. 170).

(3) This suit involves a construction of the Federal Motor Carrier Act, 1935, which has never been passed on by this Court, which is of such peculiar gravity and general importance both to the Federal Government and its administrative agency, the Interstate Commerce Commission, and to the States (as well as your petitioner) that it ought to be passed on by this Court in this:

(a) The Circuit Court of Appeals has held in this case that although the authority to grant interstate certificates of convenience and necessity is lodged exclusively in the Interstate Commerce Commission, and that although a carrier obtains such a certificate from said Commission, nevertheless said certificate carries with it no right to use the highways of a State and that such a carrier must then beg of the State Commissions the right to use the highways.

(b) Such holding of the Circuit Court of Appeals nullifies the Commerce Clause of the Federal Constitution and defeats interstate motor carrier common carrier regulation by the Federal Government.

(c) Such holding of said court permits the States to directly regulate interstate commerce and to deny it altogether in plain violation of the Commerce Clause.

(d) Such holding of said court nullifies the Motor Carrier Act, 1935, and defeats the express congressional purpose and will be found in Section 202 (U. S. C. A., Title 49, Sec. 302) of said Act wherein it is declared to be the policy of Congress to so regulate transportation by motor carriers as to "preserve the inherent advantages of, and foster sound economic conditions * * * in the public interest" and "to develop

and preserve *a highway transportation system properly adapted to the needs of the United States and of the National defense*" (emphasis ours), all of which would be utterly impossible if the Interstate Commerce Commission can *only* say when a carrier may have a certificate and the States have the *final* say and tell such carrier if he can in fact actually operate.

(e) Such holding of said Court places the direct regulation of interstate commerce by motor carrier under the joint control of the Federal and State Governments (and their commissions) whereas the states have never had any power to directly regulate interstate commerce but may, of course, pass such regulation as may incidentally affect interstate commerce.

(4) The opinion and judgment of the Circuit Court of Appeals in its application to State laws, and especially to the Texas Motor Truck Law, makes those laws unconstitutional as a direct regulation of interstate commerce, in violation of the Commerce Clause; an application which this Court and the Supreme Court of Texas has studiously avoided. This Court bottomed its opinion which sustained the Texas Truck Law (Acts 1931, 42nd Leg., page 480, Ch. 277; Art. 911b Vernon's Annotated Civil Statutes of Texas, 1925) in *Stephenson* v. *Binford*, 287 U. S. 251, 53 Sup. Ct. 181, upon the proposition that the Texas statute "rests definitely upon the policy of highway conservation" a mere incidental regulation of interstate commerce which as made clear in *Sproles* v. *Binford*, 286 U. S. 374, 52 Sup. Ct. 581, the State may prescribe "in the absence of national legislation especially covering the subject * * *". The Supreme Court of Texas in *Southwestern Greyhound Lines* v. *Railroad Commission of Texas*, et al. 99 S. W. (2d) 268 held that whatever right the Railroad Commission of Texas had to require any kind of a certificate had been superseded by the Motor Carrier Act, 1935, and the Court of Civil

Appeals of Texas in *Railroad Commission* v. *Bates*, 108 S. W. (2d) 296 holding that whenever the Interstate Commerce Commission issued a carrier a certificate that the Texas Commission must issue its certificate more as a matter of registration "as a matter of right." Any other holding would effect a direct regulation of interstate commerce and such a State statute would be robbed of the only theory upon which it could be sustained.

(5) Congress having occupied the field of interstate regulation of motor transportation as relates to the grant of "certificates of convenience and necessity" and provided for their issuance in Section 206 of the Motor Carrier Act, 1935 (U. S. C. A., Title 49, Sec. 306) and providing that no carrier "subject to the provisions of this part" shall operate without such certificate, "unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission *authorizing such operations*" and providing in section 208 of said Act that such certificate shall specify certain things including "the routes over which, the fixed termini, if any, between which" and "the territory within which, the motor carrier *is authorized to operate*" all State authority, if any it ever had, is superseded and the adverse determination of that question by the Circuit Court of Appeals presents a question of such gravity and difference of opinion between said Court and the Supreme Court of Texas and of such importance to the jurisdiction of the Nation as not only gives but requires this Court to take jurisdiction to correct the obviously erroneous judgment herein complained of.

(6) Under the undisputed facts found by the trial court, petitioner is entitled to certain valuable rights, properties, and rights of property in that the trial court found that petitioner was in "bona fide operation" on June 1, 1935 (R. 35) as that term is used in Section 206 of said Act, to

which rights petitioner lays claim under said Act and in respect of which he seeks the protection of this Court under the rights guaranteed to him under the Commerce Clause, the 5th and 14th Amendments to the Constitution of the United States.

(7) The following cases, among others, sustain the jurisdiction of this Court to review the instant case:

Gibbons v. *Ogden*, 22 Sup. Ct. 1, 9 Wheat. 23;
Gilman v. *Philadelphia*, 3 Wall. 713;
Bowman v. *C. & N. W. Ry. Co.* 125 U. S. 465, 8 Sup. Ct. 689;
Bush v. *Maloy*, 45 Sup. Ct. 327;
Northern Pacific Ry. Co. v. *Washington*, 222 U. S. 370;
Chicago, Rock Island & Pacific Ry. Co. v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 176;
Erie R. Co. v. *New York*, 233 U. S. 671, 34 Sup. Ct. 759;
M. K. & T. v. *Harris*, 234 U. S. 417, 34 Sup. Ct. 792;
Prigg v. *Pa.*, 41 U. S. 535, 16 Pet. 539;
Smith v. *Alabama*, 124 U. S. 466, 8 Sup. Ct. 564;
Southern Ry Co. v. *Railroad Commission of Indiana*, 236 U. S. 439, 35 Sup. Ct. 304;
Washington Oregon Co. v. *State of Washington*, 270 U. S. 87, 46 Sup. Ct. 279;
Missour Pacific v. *Porter*, 273 U. S. 341, 47 Sup. Ct. 383;
International Shoe Co. v. *Pinkus*, 278 U. S. 261;
Southwestern Greyhound Lines, Inc. v. *Railroad Commission of Texas, et al.*, 99 S. W. (2d) 268;
Railroad Commission of Texas v. *Bates, et al.*, 108 S. W. (2d) 256;
State ex rel. L. & L. Freight Lines v. *Douglas*, 169 So. 389;
State ex rel. R. C. Motor Lines v. *Florida Railroad Commission*, 123 Fla. 345, 166 So. 840;
Stephenson v. *Binford*, 287 U. S. 251, 53 Sup. Ct. 181.

Statement of the Case.

A full statement of the case has been given under the *summary statement* in the petition and in the interest of brevity the statement is not repeated here.

Specification of Errors.

(1) The Circuit Court erred in holding that the Motor Carrier Act, 1935, does not authorize a carrier receiving a certificate of convenience and necessity, under authority thereof, to use the "various highways of the State" (R. 169) in that there is both express and necessarily implied authority found in the statute.

(2) The Circuit Court erred in holding that the Motor Carrier Act, 1935, "does not provide that every person who shall receive a certificate of public convenience and necessity shall be entitled to the use of the various highways of the State" (R. 169) in that such holding defeats the expressed will of Congress announced in Sec. 202 of said Act and denies the express authority found in Sections 204, 206, 207, and 208 of the Act.

(3) The Circuit Court erred in the holding pointed out in the next preceding specification of error in that such holding denies the existence of the Commerce Clause of the Federal Constitution or attempts to nullify it.

(4) The Circuit Court erred after holding that "The Interstate Commerce Commission under the Act has the power and exclusive authority to pass upon such applications" (R. 169) that nevertheless the State of Texas could require a certificate of authority as a condition precedent to the use of the highways in interstate commerce the provision of the Federal Act not being "in direct conflict with the provisions of the Motor Truck Laws of the State of Texas" (R. 169) it being inconceivable how greater con-

ict could arise when the power asserted in this cause by espondents, and which the Circuit Court says they have, the absolute power of veto and the power to prohibit nterstate commerce.

(5) The Circuit Court erred in its holding as demonrated in those portions of the opinion referred to in the receding specifications that the power to regulate and ontrol interstate motor transportation resides jointly in he State and Federal governments in that there can be o such thing as joint control for the obvious reasons that:

(a) Either government under the holding of the Circuit Court would have the power of absolute veto over interstate commerce, bringing about inevitable conflict and confusion; the very thing that the Commerce Clause of the Federal Constitution, based upon experience, was designed to prevent.

(b) Under the opinion of the Circuit Court and the authority which it says the Railroad Commission of Texas has, the state would directly (not incidentally) regulate interstate commerce in plain violation of the Commerce Clause of the United States Constitution.

(6) The Circuit Court of Appeals erred in so construing he Texas Motor Truck Law as to give the Railroad Comission of Texas under said Act authority to directly regute interstate commerce, contrary to the Constitution of he United States and contrary to the construction given he Texas Act by the Supreme Court of Texas in the *Southestern Greyhound Lines* case, 99 S. W. (2d) 268, and by he Court of Civil Appeals of Texas in the *Bates* case, 98 S. W. (2d) 283.

(7) The Circuit Court of Appeals erred in holding that e Motor Carrier Act, 1935, did not supersede the Texas

Motor Truck Law in respect to the matter of granting of certificates of convenience and necessity to operate in interstate commerce.

(8) The Circuit Court of Appeals erred in its holding that the Motor Carrier Act, 1935, did not supersede the Texas Motor Truck Law, the court saying "The authority and control over the highways which the Railroad Commission is attempting to exercise is not the same authority and power to regulate interstate commerce as is vested in the Interstate Commerce Commission" in that:

(a) The power to regulate the use of the highways in the manner as construed by the Circuit Court departs from highway regulation and becomes a regulation of commerce itself. The power to veto the flow of interstate commerce is not a highway regulation but a regulation of commerce.

(b) Congress having occupied the field of authority to grant certificates of convenience and necessity, this entire field is preempted to the complete exclusion of State regulation or authority; it being a conclusive presumption that Congress has gone as far in that field as it thought necessary and that no further or additional Congressional action was required and no further State regulation may be enacted nor invoked in aid of nor supplementary to the Federal legislation as to right itself to carry on interstate commerce.

(9) The Circuit Court erred in its holding that the Motor Carrier Act, 1935, "does not provide for any tribunal to determine the method by which the public highways of any State shall be maintained or preserved, nor how the safety of the traveling public may be protected against any dangers that might be caused by an undue amount of traffic" (R. 169) in that:

(a) It must be assumed (if any such question enters into consideration) that the Interstate Commerce Com-

ission will so protect the Nation's highways and the power to do so is necessarily implied from the authority granted.

(b) If we are in error as to the assumption set out in the next preceding paragraph then the silence of Congress on that subject amounts to a legislative declaration that no such legislation is needed at present and State laws may not be invoked in aid of, as either supplementing or complementing, the Federal legislation.

(c) Assuming arguendo, that we are in error in both sub-paragraphs (a) and (b) above, then it is asserted that the Circuit Court was in error in that the Motor Carrier Act, 1935, is an open legislative declaration that no Congressional legislation on this subject was necessary, the Act having declared that:

"Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." (Sec. 208, Motor Carrier Act, 1935.)

This excludes state legislation in respect to the matters complained of in the Court's holding quoted above and negatives the entire thesis of the Circuit Court.

(d) Section 204-(a) (1)-(2), and (3), Motor Carrier Act, 1935 specifically enters the field which the Circuit Court said was still reserved to the state and by express provisions authorizes the Interstate Commerce Commission "To regulate common carriers by motor vehicle" and to "establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees *and safety of operation*

and equipment." Section 204(a)(2) refers to the contract carriers in same language and Section 204(a)(3) private carriers providing for "reasonable requirements to promote safety of operation" etc., all of which is such a definite entry of the field by Congress to provide a "tribunal" to determine a method by which the highways "shall be maintained or preserved" and to protect "the safety of the traveling public" as to completely exclude state action or interference. The Interstate Commerce Commission is exercising that authority (see Ex Parte No. M. C.-2 and Ex Parte No. M. C.-4). The Circuit Court's contrary holding is error.

(10) The Circuit Court erred in reversing the trial court's judgment and ordering the bill dismissed in that the Interstate Commerce Commission is not a party to the suit and the only effect of the permanent injunction was, first, to preserve petitioner's valuable rights guaranteed under the Constitution and Section 206(a) of the Motor Carrier Act, 1935, which provides: "That, subject to section 210, if any such carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for which application is made, *and has so operated since that time* * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, *and without further proceedings*, if application" is made as required in paragraph (b) of said section and within one hundred twenty days, such language of the statute not only clearly authorizing but *requiring* a continuance of the operation to preserve valuable rights; and, second, to prevent irreparable injury in the destruction of petitioner's business and good will.

(11) The Circuit Court erred in reversing the trial court and ordering the bill dimissed in that although the injunction was permanent it was in fact temporary in nature because if the Interstate Commerce Commission refused petitioner's application he could not operate anyway and it was error to deny to petitioner the clear right conferred upon him by the Constitution and Section 206(a), in fact required of him, petitioner being in *bona fide* operation on June 1, 1935 (R. 38, Court's Conclusion of Law No. 4); which raises the very interesting question, if the Circuit Court could conceivably be right, that if a carrier has to get both State and Federal certificates, where should he first go?

(12) Sifted down the Circuit Court holds that your petitioner is not entitled to operate and that respondents can stop him in spite of the fact that the trial court held that petitioner was in *bona fide* operation on June 1, 1935 and continuously since, and in spite of the fact that Joint Board No. 16 of the Interstate Commerce Commission has held that petitioner was in *bona fide* operation on June 1, 1935 and continuously since and recommended the grant of an interstate certificate (Report and Recommended Order Joint Board No. 16 in M. C. 80,415) thus setting up the State as establishing the rule of conduct in the flow of interstate commerce. The holding of the Circuit Court and the facts of this case is the best argument in demonstration of the conflict of law and the error of the Circuit Court of Appeals judgment.

ARGUMENT.

Summary of the Argument.

Point A.

The Motor Carrier Act, 1935, Title 49, U. S. C. A. Section 301, *et seq.*, in respect to any authority of the Railroad Commission of Texas to grant to or require from an inter-

state carrier by motor vehicle a certificate or permit authorizing the use of the highways, superseded such State authority, if any it ever had.

Point B.

There can be no such thing as joint or divided authority to regulate interstate commerce wherein the States could veto the authority of the Federal Government; the principle being established that the exercise by the State of its police power, which would be valid in the absence of Federal regulations, is superseded by Federal authority when there is such repugnance or conflict that is so direct and positive that the two acts cannot stand together.

Point C.

Exclusive jurisdiction of Interstate Commerce Commission with reference to certificate having attached through petitioner's filed application, the same negatives asserted State jurisdiction and forbade State interference.

Point D.

The provision of Section 206, Motor Carrier Act, 1935, that "pending the determination of any such application the continuance of such operation shall be lawful" directly authorizes petitioner to continue his operations and necessarily forbids interference by State authorities, and injunction of District Court enjoining such interference was right.

POINTS A & B.

The Motor Carrier Act, 1935, superseded all Texas laws purporting to require a certificate or permit to operate in interstate commerce.

This case is not an appeal from any order of the Railroad Commission of Texas as seemingly conceived by the Circuit Court of Appeals (R. 169-170).

Your petitioner was a party to an appeal from an order of the Railroad Commission of Texas in a case which arose prior to the passage of the Motor Carrier Act, 1935 and which involved another and entirely different set of facts and circumstances, and the Court of Civil Appeals of Texas in *Railroad Commission of Texas* v. *McDonald*, 90 S. W. (2d) 981, which passed on the appeal after the passage of the Motor Carrier Act, 1935, said:

> "All of the matters here presented were passed upon and determined prior to the passage and effective date of what is known as the Federal Motor Carrier Act, 1935 (Title 49, U. S. C. A. section 301, *et seq.*), effective August 9, 1935, and we have not taken that act into consideration in determining the issues here presented."

Your petitioner here being in *bona fide* operation over the highways on June 1, 1935 (R. 38), filed his application within the time required by the Motor Carrier Act, 1935 (R. 36), and was entitled to continue to operate exclusively in interstate commerce, as he was doing (R. 36), until the Interstate Commerce Commission passed upon his application, either granting or denying the same. When confronted with an effort on the part of the Railroad Commission of Texas, the respondents herein, application was made to the Federal District Court for the Northern District of Texas and upon trial of the cause upon its merits a permanent injunction was issued by that court (R. 33).

The questions presented here therefore are, first, whether the Railroad Commission of Texas can regulate interstate commerce by requiring of an interstate common carrier truck operator a permit or a certificate to use its highways while the Interstate Commerce Commission, under authority of Congress, as set out in the Motor Carrier Act, 1935, is regulating that commerce in the requirements for certificates of convenience and necessity, and,

second, whether your petitioner is entitled to continue his operation as a motor carrier under the Act of 1935, as he is entitled to do, until the Interstate Commerce Commission either grants or refuses the application.

The Circuit Court of Appeals in its opinion says with reference to the supposed requirement of the Texas Act requiring an exclusively interstate motor truck carrier to have a permit to use the highways of the State of Texas "is not in direct conflict" with the provisions of the Motor Carrier Act, 1935 requiring of all interstate motor truck operators operating as common carriers a certificate of convenience and necessity.

The effect of the opinion therefore is this: That before a common carrier truck operator can operate in interstate commerce, although such operator has complied with the Acts of Congress by obtaining from the Interstate Commerce Commission a certificate of convenience and necessity as required by Section 206, Motor Carrier Act, 1935, he must still go to the various State commissions and obtain a permit from the State commissions to use the highways. Such an interpretation of State laws amounts to a direct regulation of interstate commerce because it puts it within the power of the State either to permit interstate commerce to flow freely over the highways of the State or to forbid it altogether. The States have never had any such power.

The Commerce Clause of the Constitution of the United States makes it clear that the regulation of interstate commerce is a matter which is national in scope and admits of only one uniform regulation and that regulation may of course be imposed only by Congress. Various State laws, including the Texas Motor Truck law, have been sustained on the theory of their being only highway regulation and as only incidentally affecting interstate commerce. Now the Circuit Court of Appeals construes the Texas law in

a way which makes it a direct regulation of interstate commerce, putting it within the power of the State of Texas to either permit the flow of interstate commerce or to veto it in spite of any authorization of the Interstate Commerce Commission for operation over the highways of the State of Texas.

Such could hardly be the law, and how could there be a more direct regulation of interstate commerce, and how there could be greater conflict is inconceivable. We assume that it would be almost improper to begin this argument without first referring to *Gibbons* v. *Ogden,* 22 Sup. Ct. 1, 9 Wheat. 23, the leading case upon this subject and which, as we conceive it, definitely and finally settles the question presented in this case.

Can the State require a permit of any kind to operate in interstate commerce since the Federal Government has occupied that field and has required of interstate truck operators certificates of convenience and necessity before engaging in common carrier transportation over the highways?

Now that we have referred to *Gibbons* v. *Ogden, supra,* to which we shall find occasion later to refer, we want especially to refer to the *Passenger Cases,* 7 Howard 283, in which this Court said:

> "A concurrent power excludes the idea of a dependent power. The general government and a state exercise concurrent powers in taxing the people of the state. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. *A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing.* The action of one, unless there be an arrangement, must

> necessarily precede the action of the other; and that which is first, being competent, must establish the rule. If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action. (Emphasis ours.)

It seems that we are not required to go further to establish the fact that the State of Texas cannot require certificates while the Federal Government is requiring certificates of convenience and necessity of those engaged as common carrier truck operators. It is obvious that under the opinion of the Circuit Court of Appeals in this case, if that be the law, that the State of Texas could at any moment undo anything that the Interstate Commerce Commission did and that any one of the other forty-seven states and the District of Columbia could do the same thing. This is a direct clash of governments and of laws wherein State action is superseded.

But going on with the holding of this Court in the *Passenger Cases, supra*, this Court said:

> "It has been well remarked that the regulation of commerce consists as much in negative as in positive action. There is not a federal power which has been exerted in all its diversified means of operation. And yet *it may have been exercised by Congress, influenced by a judicious policy* and the instruction of the people. Is a commercial regulation open to State action because the Federal power has not been exhausted? *No ingenuity can provide for every contingency; and if it could, it might not be wise to do so.* Shall free goods be taxed by a state because Congress have not taxed them? Or shall a state increase the duty, on the ground that it is too law? Shall passengers, admitted by act of Congress without a tax, be taxed by a state? The supposition of such a power in a state is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress." (Emphasis ours.)

Congress has occupied the field of interstate regulation as to the requirements for certificates of convenience and necessity, and it must be assumed that Congress has exerted that power to the extent that it felt that it ought to be exerted, and such exertion of power excludes any idea of a similar exertion of a like power by the States. May it not be said that Congress has exerted this power "influenced by a judicious policy" and that a similar exertion by the States is no longer open to them.

In *McCulloch* v. *State of Maryland*, 4 Wheat. 431, this Court said:

> "That there is a plain repugnance in conferring on one government a power to control the constitutional measures of another which other, with respect to those very measures, is declared to be supreme over that which exerts the control is a proposition not to be denied."

Yet in the face of these decisions of this Honorable Court and what we have thought had come to be elementary principles of law fixed in this country, the Circuit Court of Appeals says that the State of Texas can regulate interstate commerce by requiring of an interstate truck operator a permit to use that State's roads, while Congress has provided for the Interstate Commerce Commission to issue certificates of convenience and necessity, authorizing the use of the public roads. The two requirements operate upon exactly the same subject matter and at the same time. It places it within the power of the State to undo everything the Interstate Commerce Commission does. It puts within the power of the States the arbitrary power to veto interstate commerce.

Let it be remembered that the Commerce Clause of the Federal Constitution was made a part of that Constitution because of the experience of the States under the Confederation within which each State regulated commerce be-

tween itself and every other State, and which regulation was about to bring on internal strife and bloodshed. It was recognized by the framers of the Constitution that the regulation of interstate commerce or commerce between the States, foreign countries, and the Indian tribes was of such a nature as to admit only of one control and of one national, uniform regulation. Let it be remembered further in considering this case, that at the time of the adoption of the Commerce Clause into the Federal Constitution that railroads were unknown. Interstate commerce was carried on then only by means of roads and navigable waters.

The Commerce Clause adapts itself to new or changing means and modes of transportation, but in keeping the public roads and highways of the nation open to a free flow of interstate commerce, the Commerce Clause is not adapting itself to a new means of transportation because those roads themselves are as much a part of the instrumentality of commerce as the use of the newly developed truck in the handling of interstate commerce. The Commerce Clause made it clear in the beginning that this original means of interstate commerce, the highways of the country, should be kept open to a free flow of interstate commerce—the truck simply displaces the ox-cart and the horse-drawn wagon.

The Circuit Court of Appeals has said in this case "that said act does not provide that every person who shall receive a certificate of public convenience and necessity shall be entitled to the use of the various highways of the State." (R. 172.) In other words, under the opinion of the Circuit Court before one is authorized to operate under the Motor Carrier Act of 1935, he must get two certificates of convenience and necessity—one by complying with the acts of Congress and obtaining such a certificate from the Interstate Commerce Commission, and then by complying with the requirements

of State regulation, which the courts have chosen to designate a permit—contrary to the designation of the Texas law wherein they are called certificates of convenience and necessity. This is dual regulation—two sovereignties operating upon the same subject matter at the same time—one undoing the acts of the other. This cannot be.

But going back to the Circuit Court's statement that the act does not provide that a person who receives a certificate from the Interstate Commerce Commission is authorized to operate. It is clear from an examination of the Motor Carrier Act, 1935, as well as from the records of the co-ordinator of transportation in his report to Congress in 1934 and from the consideration of the Act in Congress (Congressional Record for Monday, April 15, 1935, pages 5877 to 5896, inc., and for Wednesday, July 31, 1935, pages 12679 to 12716, inc.) that there never was any thought whatsoever except that when the Interstate Commerce Commission had issued its certificate of public convenience and necessity under the provisions of the Motor Carrier Act, 1935, that such certificate would authorize the holder thereof to operate over the highways of the States irrespective of any action by the States. A very large number of States, in fact practically all of them, had, prior to the consideration of the Motor Carrier Act, 1935, by Congress, enacted some form of regulatory measure, such regulations applying to intrastate commerce and some of them, as the Texas Act, applying to a regulation of the use of the highways in interstate commerce. This Court has uniformly refused to sustain State laws of this character involving commercial consideration for the use of the highways, or which attempted to require certificates of convenience and necessity of interstate operators. *Buck* v. *Kuykendall*, 267 U. S. 307, 45 Supreme Court 324; *Bush* v. *Malloy*, 45 Sup. Ct. 327; *Morris* v. *Duby*, 274 U. S. 143, 71 L. Ed. 966, and other cases. The Court had sustained some of those laws, including the Texas law, on the basis

that they were purely highway regulatory laws. *Sproles* v. *Binford*, 286 U. S. 374, 76 L. Ed. 167; *Stephenson* v. *Binford*, 53 Sup. Ct. 181.

Every State law which provided for certificates of convenience and necessity was a law which authorized the holder of such certificate of convenience and necessity, issued by the proper commission, to use the highways of the particular State. This fact was before Congress and Congressional consideration of the use of the phrase "certificate of convenience and necessity" conveyed no other thought than that when such certificate was issued by the Interstate Commerce Commission to a carrier that it carried with it the authority to use the highways.

This thought recurs throughout the Motor Carrier Act, 1935.

The declaration of policy in Section 202 of the Motor Carrier Act, 1935, declares it to be the policy of Congress to regulate transportation by Motor Carriers "in such manner as to recognize and preserve the inherent advantages of *and foster sound economic conditions in,* such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; *develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States, and of the national defense;*" etc. The effect of the decision of the Circuit Court in this case is that McDonald must have a State permit in order to operate lawfully even though he now is a part of a national interstate system of motor transportation designed by Congress to assist in the national defense. A war measure

under such a construction is thus made dependent on the will and consent of State agencies.

If it be within the power of a State to veto the acts of Congress by stopping interstate commerce at its border as the Circuit Court has said, and if upon the issuance by the Interstate Commerce Commission, in accordance with the requirements of the Motor Carrier Act, 1935, of a certificate of convenience and necessity an operator by motor vehicle cannot operate, how can the policy of Congress as stated in the declaration of policy be carried into effect "and foster sound economic conditions in such transportation * * * in the public interest" and how can the policy of Congress be given effect to "promote * * * efficient service by motor carriers," and how can the policy of Congress be given effect by the Interstate Commerce Commission "to develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense?" The Federal Government could not possibly develop and preserve a highway transportation system adapted to the needs of the commerce of the United States and of the national defense if it be put within the arbitrary power of a State to meet the holder of a certificate of convenience and necessity issued by the Interstate Commerce Commission at a State boundary and say to such an operator, it is true that you have complied with the acts of Congress, but here you must stop. You cannot use our highways. A clearer case of conflict of law cannot be imagined.

Again, it is made clear that a certificate of convenience and necessity issued under the Motor Carrier Act, 1935, authorizes the use of the highways and supersedes all State law on that subject by subdivision (c) of Section 202, Motor Carrier Act, 1935, wherein Congress said:

> "Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize

a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

This Section 202, Motor Carrier Act, 1935, to which we are referring is designated as "Declaration of Policy and Delegation of Jurisdiction." There is a familiar rule of construction that that which is not included is excluded, and Congress has seen fit to say to the States exactly what powers they can exercise, and since it has enumerated those powers as to interstate commerce all other powers are excluded. It is plain and certain from a consideration of the declaration of policy and delegation of jurisdiction that certificates of convenience and necessity issued by the Interstate Commerce Commission pursuant to the Motor Carrier Act, 1935, carries with it the authority to use the highways of the various States, and that all laws in conflict therewith are superseded. The Circuit Court of Appeals at New Orleans erred in holding otherwise. But this is not all that is found in the Motor Carrier Act to show that certificate of convenience and necessity carries with it the authority to use the highways of the State, because Section 206, Motor Carrier Act, 1935, uses the language, "unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission *authorizing* such operations."

Section 207, Motor Carrier Act, 1935, uses the language "subject to Section 210, a certificate shall be issued to any qualified applicant therefor, *authorizing the whole or any part of the operations covered by the application.*" (Emphasis ours.)

Section 208, Motor Carrier Act, 1935, uses the language, "Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate

and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, *the territory within which, the motor carrier is authorized to operate.*" (Emphasis ours.)

Section 209, Motor Carrier Act, 1935, with reference to contract carriers, used the word "authorized." There is no doubt at all upon a consideration of the Motor Carrier Act and its legislative history but that Congress intended and that it did, in providing for the issuance of certificates of convenience and necessity, provide that the holder of such certificate would be authorized to use the various highways of the State, State legislation to the contrary notwithstanding.

This Court and various other Federal courts, as well as the Supreme Court of this State, has been very careful in order to uphold the constitutionality of the Texas motor truck law as applied to interstate commerce, to give it any effect at all as to such commerce, to hold it valid as it may have applied to the incidental regulation of the use of the highways, unquestionably its principal purpose being the regulation of commerce as such. *Sproles* v. *Binford, supra; Stephens* v. *Binford, supra; Southwestern Greyhound Lines, Inc.,* v. *Railroad Commission,* Supreme Court of Texas, 99 S. W. (2d) 263; *Railroad Commission of Texas et al.* v. *Bates,* Texas Comm. of Appeals, 108 S. W. (2d) 296. But now the Circuit Court of Appeals in this case interprets the Texas truck law in a way such as to make it wholly unconstitutional, as being a direct regulation of interstate commerce, and therefore wholly unconstitutional. In the *Greyhound Lines* case, *supra,* the Supreme Court of Texas said that the Texas truck law was superseded by the Federal Motor Carrier Act, using the following language:

> "An analysis of the Act (Federal Motor Carrier Act, 1935) clearly shows that it was the purpose of

Congress in enacting this law to delegate to the Interstate Commerce Commission the *exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce* on the highways for a certificate of public convenience and necessity. Such construction of the law does not deprive the State from protecting its highways and the public safety by reasonable and uniform regulation and exacting reasonable compensation for the use of such highways. *Michigan Public Utilities Commission, et al.* v. *Duke*, 266 U. S. 570, 45 Sup. Ct. 191, 69 L. Ed. 445, 36 A.L.R. 1105; *Buck* v. *Kuykendall*, 267 U.S. 307, 45 Sup. Ct. 324, 69 L. Ed. 623, 38 A.L.R. 286. It is not necessary to discuss here the extent of the power of a state to make such rules and regulations nor to define them because that question is not before us.

"The Federal Motor Carrier Act was approved by the President on August 9, 1935. Congress having assumed jurisdiction over this class of legislation, such control is exclusive and such act of Congress superseded State legislation". (Emphasis ours.)

The Court of Civil Appeals of Texas in passing upon the *Bates* case, *supra*, said:

"By the language quoted the Supreme Court held that the Act vested in the Interstate Commerce Commission exclusive authority to pass on all applications of motor carriers engaged exclusively in interstate commerce on public highways for certificates of public convenience and necessity. The court also held that in aid of the enforcement of state policy regulations, the state commission might promulgate reasonable rules and regulations for the protection of the highways and their use by the public; and that it might in like manner establish requirements with respect to safety of equipment or standard of equipment, payment of compensation for the use of the highways, qualifications of truck drivers, insurance, and any other matters over which the jurisdiction of the State

Commission is not in conflict with nor displaced by the Federal Act. *To that end no doubt the Commission may require of each interstate carrier an application for some sort of certificate or permit to be issued after a certificate of convenience and necessity has been issued by the Interstate Commerce Commission, and to be issued as a matter of right upon proper application after the Interstate Commerce Commission has passed upon and issued its certificate of convenience and necessity.*" (Emphasis ours.)

The same court in concluding said:

"Manifestly, if the State Commission cannot be compelled to issue a certificate of convenience and necessity to enable it to enforce its state police regulations to an interstate carrier already temporarily operating under his pending application to the Interstate Commerce Commission for a permanent certificate, then the Commission should not and cannot require of such operator a certificate or permit until the federal right has been made permanent." (Emphasis ours.)

Thus we have the Circuit Court of Appeals in this case construing and interpreting our Texas statute in an unconstitutional way, a construction which should be avoided where possible, and contrary to the interpretation which has been placed upon that statute by our highest State court. We think we need no citation of authority for the proposition that the meaning and scope of application of State laws by the highest State court is binding upon Federal courts.

In our further consideration of this case, we may entirely dismiss from consideration the recent case of this Court in *South Carolina State Highway Commission et al. v. Barnwell Bros.*, — Sup. Ct. —, because that case is not in point, although the Circuit Court of Appeals relies almost entirely upon such case to support its decision herein. It was ob-

vious to us from the beginning that this Court would not hold that the weight provisions of the South Carolina law had been superseded by the Motor Carrier Act, 1935. Section 225, Motor Carrier Act, 1935, made it clear that Congress did not intend to occupy at this time that phase of interstate regulation. That is a matter on which the States may legitimately legislate. It is perhaps a field which is not of such national scope as to require uniformity of regulation. Congress having made it clear by Section 225 that it had not touched that field by merely *authorizing* investigation upon which it might base future regulation. The clear and obvious distinction between the *Barnwell* case and this case is that by Sections 206, 207, 208, 209, 210, and 211 of the Act, Congress did very clearly occupy the field with reference to certificates of convenience and necessity which would authorize the actual carrying on of operations over the highways of the States.

We may likewise dismiss from further consideration the case of *Kelly* v. *State of Washington*, 58 Sup. Ct. 87, because the very obvious distinction between that case and the case at bar is stated by this Court in the following language:

> "In the instant case, in relation to the inspection of hull and machinery, *the State touches that which the Federal laws and regulations have left untouched.*" (Emphasis ours.)

The Federal law left the question of weights of load and vehicle untouched. The Federal law, rather than leaving the question of certificates or permits untouched, very directly occupied that field. Many of the authorities cited in *Kelly* v. *State of Washington, supra*, support the contention which your petitioner is making in this case.

In every case in which state regulations have been sustained, such as the Texas Truck Law, this Court has been

careful to use the language "in the absence of national legislation" and in practically all of those cases this Court has said that "the states may act within their respective jurisdictions until the Congress sees fit to act." With reference to the issuance of certificates of convenience and necessity or permits, we may, as was done in *Gibbons* v. *Ogden, supra,* dismiss that inquiry because there is now national legislation upon the subject. This Court in *Gibbon* v. *Ogden, supra,* saying:

> "In argument, however, it has been contended that if a law passed by a state in the exercise of its acknowledged sovereignty comes into conflict with a law passed by Congress in pursuance of the Constitution they affect the subject and each other like equally opposing powers,"

and again—

> "In discussing the question whether this power is still in the states in case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress or is retained until Congress shall exercise the power, *we dismiss that inquiry because it has been exercised and the regulations which Congress deemed it proper to make are now in full operation. The sole question is can a State regulate commerce between foreign nations and among the states while Congress is regulating it.*" (Emphasis ours.)

The Circuit Court holds in this case that because the State has passed a law *which it might pass in the absence of Federal regulation,* that still in spite of the fact that Congress has acted, the State can still regulate the use of its highways, although the State regulation comes into direct conflict with the Federal law, as we believe we have thoroughly demonstrated, and like the *Freight Rate Taxing Cases,* 15 Wall. 232, were passed for a legitimate purpose,

yet, as construed by the Circuit Court in this case, amounts to a direct regulation of interstate commerce.

For instance, the Interstate Commerce Commission might find that public convenience and necessity and the development of that system of motor transportation necessary to the needs of the commerce of the United States and of the national defense, requires the operation of a common carrier truck-line from St. Louis, Missouri, to Houston, Texas, which would traverse the States of Missouri, Kansas, Oklahoma, and Texas, and the Interstate Commerce Commission might issue such a certificate and authorize such an operation, yet under the opinion of the Circuit Court of Appeals those States could arbitrarily block and stop that movement of interstate commerce. Or the Commission might authorize the operation of a line from Los Angeles to New York traversing the State of Texas and that entire system could be destroyed so far as any value to interstate commerce is concerned by the arbitrary action of one of the several States traversed.

This Court in *Gibbons* v. *Ogden, supra,* after stating the question "can a State regulate commerce with foreign nations and among the States while Congress is regulating it" decided that question adversely to the Circuit Court of Appeals in the following language:

> "What is this power?
>
> "*It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed, This power like all others vested in Congress is complete in itself. May be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.*" (Emphasis ours.)

The Circuit Court's opinion *in this case would permit the States to prescribe the rule of decision and result in the superiority of State decisions over Federal decisions* and would lead only to endless conflict. If the Federal regula-

tory power and its administrative commission, the Interstate Commerce Commission, should be made a handmaiden to the State regulatory authority whereby a person operating in interstate commerce would be required to first go to the State commissions and secure their permission to operate over the highways of the States before such person could go to the Interstate Commerce Commission for authority to so operate, or if first having gone to the Interstate Commerce Commission and having received its authority would then be required to go to the States and beg their permission to operate over the highways of the forty-eight different States or any one of them, the result would be chaos.

But the Supreme Court in *Gibbons* v. *Ogden, supra,* answered this argument in the following language:

> "But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. *In every such case, the Act of Congress, or the treaty is supreme; and, the law of the State, though enacted in the exercise of powers not controverted, must yield to it.*" (Emphasis ours.)

It may be admitted, therefore, that the State exercised a legitimate power in passing the Motor Truck Law, *yet,* when that *power is so exercised as to become a regulation*

of interstate commerce, and when Congress has acted as it has acted in the passage of the Motor Carrier Act, 1935, the State law must yield. The power to tax is a power which may be legitimately exercised by the States. The power to tax is the power of government preservation and supplies the very life-blood of any government, but in the case of the *State Freight Rate Tax,* 15 Wall. 232, it was held that a tax on interstate commerce was a regulation of interstate commerce, and however legitimate in its origin, that this power must give way before the paramount power of Congress in the regulation of Interstate Commerce.

The power of taxation is one most vital to any government and necessary to its preservation. We may well inquire, therefore, whether the power of the State to regulate the use of its highways is more vital and more necessary in its preservation than the power of taxation. Of course, this could not be true. When State regulation of its highways is applied in such a way as to become a regulation of interstate commerce, it must give way before the paramount powers of the Federal Constitution and laws passed pursuant thereto.

In the case of the *State Freight Tax, supra,* a tax imposed by one State upon freight transported to or from another State was held to be void as a regulation of commerce among the States on the ground that the transportation of passengers or merchandise through a State or from one State to another "was in its nature national" so that it should be subject to a uniform system or plan of regulation under the control of one regulating power. In that case the tax was not imposed for the purpose of *regulating interstate commerce,* but in order to raise revenue and would have been a legitimate exercise of an admitted power of the State if it had not been so exerted as to operate as a regulation of interstate commerce. *Any other regulation of interstate commerce applied as the tax was in that*

case, would fall within the rule of its decision. If the State has not the power to tax freight and passengers passing through it, or to or from it, from or into another State, much less would it have the power to forbid it altogether.

The case is directly in point with the case at bar in principle. The regulation of interstate commerce flowing over the highways of the various States is in its very *nature national* and should be subject to one uniform system of regulation and one regulating power, and that power is now placed, by reason of the Motor Carrier Act, 1935, in the Interstate Commerce Commission, and regardless of how legitimate may have been the exercise of the power of the State in the passage of the State's Motor Truck laws, when it is argued that interstate commerce, flowing by means of motor vehicles, may and must still be fettered by the whims of the commissions of the forty-eight States, in a prior determination of the use to be made of highways, before the Interstate Commerce Commission can act, that regulation becomes a regulation of and burden upon interstate commerce and must give way to the paramount authority of Congress to regulate as it has done.

In *Gilman* v. *Philadelphia*, 3 Wall. 713, it was said:

> *"However, this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national or admit of one uniform system or plan of regulation they may justly be said to be of such a nature as to require exclusive legislation by Congress."* (Emphasis ours.)

In *Bowman* v. *Chicago & N. W. Railway Company*, 125 U. S. 465, 8 Sup. Ct. 689, the Supreme Court said:

> "Surely transportation of passengers or merchandise through a State or from one State to another is of this nature. It is of national importance that over that subject there should be but one regulating power * * *

"The power conferred upon Congress to regulate commerce among the states is indeed contained in the same clause of the Constitution which confers upon it the power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive. The actual exercise of its powers over either subject *is equally and necessarily* exclusive of that of the States, *and paramount over all the powers of the States; so that State legislation, however legitimate in its origin or objects, when it conflicts with positive legislation of Congress or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds must fail.*" (Emphasis ours.)

In the *Chicago & N. W. Ry. Company* case, *supra*, the Supreme Court said:

"The power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same reference and in the same clause by which was conferred power to regulate commerce with foreign nations * * * nor does it make any difference whether exchange of commodities is by land or by water."

Who can possibly deny that the regulation of the use of the highways would not prove to be *"embarrassing restrictions"* especially when the Interstate Commerce Commission in its attempted regulation of interstate commerce would thereby be subject to the whims of the regulatory bodies of forty-eight States. As stated elsewhere in this brief, such a holding would be provocative of endless conflict and would make a veritable force of regulation of interstate commerce by the Interstate Commerce Commission.

As applied strictly to the regulation of interstate commerce over the highways however, the Supreme Court of

the United States has definitely settled the case, to our minds in *Bush* v. *Malloy*, 45 Sup. Ct. 327, wherein the Court said:

> "The case presents two features which were not present in *Buck* v. *Kuykendall* * * * The first is that the highways here in question were not constructed or improved with Federal aid. This difference does not prevent the application of the rule declared in the Buck case. The Federal aid legislation is of significance not because of the aid given by the United States for the construction of particular highways, *but because these acts make clear the purpose of Congress that State highways shall be open to interstate commerce.*" (Emphasis ours.)

In *Hi-Ball Transit Company* v. *Railroad Commission*, 22 F. (2d) 425, Judge Atwell, said:

> "That the motor age has dawned does not change the law, and beginning with *Buck* v. *Kuykendall*, 267 U. S. 307, 45 Sup. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 226, wherein Mr. Justice Brandeis, for the Court, said:
>
> "'Thus, the provision of the Washington statute is a regulation not of the use of its own highways but of interstate commerce * * *. *It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways*'." (Emphasis ours.)

It is elementary that, though the Federal Government is limited in its scope, in the subjects committed to it, it is supreme, and the following cases exemplify that principle.

In *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, the Court said:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on

the subject, *and ceases when Congress acts* on the subjects or manifests its purpose to call into play its exclusive power." (Emphasis ours.)

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers' Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 176, it is said:

> "The elementary and long-settled doctrine is that *there can be no divided authority over interstate commerce* and that the regulations of Congress on that subject are supreme." (Emphasis ours.)

In *Erie R. Co.* v. *New York*, 233 U. S. 671, 34 Sup. Ct. 759, it is said:

> "The relative supremacy of the State and national power over interstate commerce need not be commented upon. *Where there is conflict, the State legislation must give way.* Indeed, *when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist.*" (Emphasis ours.)

In the case of *M. K. & T.* v. *Harris*, 234 U. S. 417, Sup. Ct. 792, it is said:

> "It is of course settled that, *when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, State laws upon the same subject are superseded.*" (Emphasis ours.)

In *Prigg* v. *Pa.*, 41 U. S. 16 (Pet.) 539, it is said:

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, *it cannot be that the State legislatures have a right to interfere and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress,*

in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the same subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it." (Emphasis ours.)

We especially invite the Court's attention to the quotation next above for its language is directly to the point in this case.

In *Smith* v. *Alabama*, 124 U. S. 466, 8 Sup. Ct. 564, the Supreme Court of the United States said:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. *It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.* As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised." (Emphasis ours.)

In *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 35 Sup. Ct. 304, the Supreme Court said:

"Without, therefore, discussing the many cases sustaining the rights of the States to legislate on subjects which, while not burdening, may yet incidentally affect interstate commerce, *it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject.*" (Emphasis ours.)

We here invoke the rule that when Congress has occupied a field of interstate commerce, its laws being valid under the Federal Constitution, are the supreme law of the land, and in this case, if the question of the condition of the roads is a subject of inquiry, then the Federal authorities are supreme.

In *Washington-Oregon Company* v. *State of Washington*, 270 U. S. 87, 46 Sup. Ct. 279, the Court said:

> "In the relation of the States to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other (and this is the one in which the legitimate exercise of the State's police power brings it into contact with interstate commerce so as to affect that commerce) *the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded State action.*" (Emphasis ours.)

A reading of the opinion of the Circuit Court impresses one with the feeling that that court has either failed or refused to recognize that local police power marks the outside boundaries of the State's field of action *even in the absence of national legislation* and that when Congress undertakes to legislate within the legitimate field of interstate commerce, its authority being supreme, the police power of the State, if in conflict, must yield. *Northern Pacific Railway Company* v. *Washington*, 222 U. S. 370.

In the *Northern Pacific Railway Company* case just cited, the Supreme Court said that the right of a State to apply its police power for the purpose of regulating interstate commerce "exists only from the silence of Congress on the subject and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power."

It was for Congress to say what regulations shall be effective after August 9, 1935. Only those made effective by or under the authority of Congress are effective at all. *Northern Pacific Railway Co.* v. *Washington, supra.* In *Washington-Oregon Company* v. *State of Washington,* 270 U. S. 84, the Court in an opinion by Mr. Justice Taft rejected the contention made that pending the exertion of plant quarantine authority by the Secretary of Agriculture the Washington Quarantine Statute remained in force and the court said:

> "But when Congress has acted and occupied the field, as it has here, the power of the states to act is prevented and suspended."

Further quoting from the opinion in that case:

> "It follows that, pending the existing legislation of Congress, as to quarantine of the diseased trees and plants in interstate commerce, the Statute of Washington on the subject cannot be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine and that if he does not act there is no invalidity in the State's action. Such construction as that cannot be given to the Federal statute. *The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine in his judgment is necessary. When he does not act, it must be presumed that it is not necessary.* With the Federal law in force, State action is illegal and unwarranted." (270 U. S. at pages 102 and 103.) (Emphasis ours.)

The Federal Motor Carrier Act, 1935, to our minds leaves no room for doubting the intention of Congress to completely occupy the field of interstate commerce by motor vehicles except as to those matters expressly excluded by

Section 225 Motor Carrier Act, 1935. The fact that Congress may not have chosen to regulate in the minutest detail every phase of interstate motor carrier operations does not signify that it was the intention of Congress that the State regulatory power should survive the occupancy of the field by the National Government.

It may no longer be said that Congress remains silent. *The interruption of its silence effects an occupancy of the field in which Congress is supreme.* It supersedes and puts an end to State legislation in so far as it affects interstate commerce.

In *Missouri Pacific* v. *Porter,* 273 U. S. 341 (345 and 346), 4 Sup. Ct. 383, citing much authority for the statement, the Supreme Court of the United States said:

> "*Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary.* Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, State laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." (Emphasis ours.)

We recognize that unless an act of Congress, when fairly interpreted, comes plainly in conflict with State regulation the general rule is that the intention wholly to exclude State action will not be implied; but, where, as here, the conflict is plain, the intention to supersede State action need not be expressed.

The Supreme Court of the United States in *International Shoe Company* v. *Pinkus,* 278 U. S. 261 (265), has said:

> "The purpose to exclude State action for the discharge of insolvent debtors may be manifested without

specific declaration to that end; that which is clearly implied is of equal force as that which is expressed. (Citing cases.) * * * In respect of bankruptcies the intention of Congress is plain. *The national purpose to establish uniformity necessarily excludes State regulation.* It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas Statute, that *intolerable inconsistencies and confusion would result* if that insolvency law be given effect while the National Act is in force." (Emphasis ours.)

The identical same thing may be said with equal emphasis with reference to the Federal Motor Carrier Act, 1935, and the Texas Motor Truck Law as it affects interstate commerce.

Section 202 of the Federal Motor Carrier Act, 1935, designated as "Declaration of Policy and Delegation of Jurisdiction," makes it plain beyond mistaking that Congress intended that interstate motor carriers should be regulated by the administration and enforcement of such act, complemented or supplemented by no State law.

Ample and complete power to administer the Motor Carrier Act, 1935, in keeping with the interests of the public in safety of the highways and the preservation thereof is bestowed upon the Interstate Commerce Commission under the Motor Carrier Act, 1935. Any other holding would amount to a granting of plenary power to the State which would burden and block the flow of interstate commerce.

The term "certificate of public convenience and necessity" is undoubtedly a comprehensive term and comprehends more than merely a determination of the question of the need of the service; it comprehends also a consideration of the structure and preservation of the highways and the safety of the public thereon. If this is the correct interpretation of the expression "certificate of public convenience and necessity"

then clearly under the provisions of the Motor Carrier Act, 1935, the Interstate Commerce Commission must consider those matters in passing upon and acting upon an interstate application. We conclude that it is a correct conception of the expression because our Court of Civil Appeals in *Railroad Commission of Texas* v. *Shupee*, 57 S. W. (2d), 295, quotes with approval from 42 C. J. 687 as follows:

> "*In determining what constitutes public convenience and necessity in a particular case* and the propriety of granting a certificate to that effect, the public service commission *may properly take into consideration the element of danger involved by the use of heavy trucks and passenger cars on highways.* The adequacy of the service rendered in the same territory by other carriers, if any, and also the ability of applicant, adequately, to render the service needed." (Emphasis ours.)

In the *Shupee* case, Judge Blair also quoted with approval the language of the Supreme Court of Florida in the case of *Seaboard Air Line Ry. Co.* v. *Wells*, 100 Fla. 1631, 131 Southern 777 (783), as follows:

> "The purpose of the statute is not only to regulate the use of the public highways by motor vehicles for compensation or hire but *in order to conserve the public roads and the safety of the traveling public thereon* to exclude from the use of the public highways in the State any and all motor vehicles operated for compensation *except such motor vehicles as are affirmatively shown to be required to serve the public convenience and necessity.*" (Emphasis ours.)

The Interstate Commerce Commission has apparently so interpreted the act as giving it authority to consider questions involving the use of the highway from the standpoint of safety and use in *Moe Gollock for Extension for Operations*, 1 M. C. C. 161. The protestants submitted evidence

to show that during certain summer months a large volume of traffic moved over a portion of the proposed route. The Commission refused to deny the application on this ground saying that the protestants had not demonstrated that the highway is incapable of bearing an added volume of traffic equal or greater than that which would result from the proposed operation.

Furthermore, Sections 204-(a)-(1)-(2)-(3) each specifically enter the field of regulation with reference to safety of the highways and make specific provisions pertaining to hours of employment and safety of operation and equipment. The Commission has entered upon the discharge of these duties and in this connection reference is here made to Interstate Commerce Commission report in Ex Parte No. M. C. 4, Motor Carrier Safety Regulations in the matter of qualification of employees in safety of operation and equipment of common carriers and contract carriers by motor vehicle, and reference is also made to Ex Parte M. C. 2 report of the Commission with reference to maximum hours of employment of drivers. In view of the provisions of the act having reference to safety and use of the highways, may it not be said that "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary," *Missouri-Pacific* case, *supra*, and especially so when we bear in mind that the regulation of interstate commerce consists *as much in negative as in positive action, Passenger cases, supra*, and that Congress might have been influenced by a *"judicious policy."* The regulation of interstate commerce is not left open to the States merely because Congress has not seen fit to exhaust in detail the possibilities of regulation to the utmost.

The Interstate Commerce Commission has rejected the idea that its certificates of convenience and necessity issued pursuant to the Motor Carrier Act, 1935, do not authorize

operation over the highways, and has rejected the idea that a holder of a certificate issued by the Interstate Commerce Commission is not authorized to operate. In the case of *In re Slagle*, 2 M. C. C. 127 the Interstate Commerce Commission has written a very able opinion, and its interpretation of the law is entitled to considerable weight. In the *Slagle* case, the Commission has said:

> "Prior to the passage of the Act, most of the states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulation the situation was a most difficult one for the states which was one of the reasons why their regulatory authorities very generally favored such regulations. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with State laws a prerequisite to rights under the 'grandfather' clauses, and have indicated how we could determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase '*bona fide*' operation, making registration 'under any code of fair competition' evidence of such operation on June 1, 1935, but saying nothing about state laws, which were not mentioned in committee reports or debates in connection with the phrase '*bona fide operation.*'
>
> "At two places in the Act, Congress made specific provision for compliance with state laws as a prerequisite to obtaining a privilege. Under Section 203 (b)(8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is 'lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each state

having jurisdiction.' Under Section 206(a) a carrier who has procured a certificate under state laws authorizing intrastate common carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operation in interstate commerce. It seems unlikely that if Congress had intended to make compliance with State laws a condition precedent to 'grandfather' privileges, it would have failed to make the same specific provisions that it did in respect to other privleges."

The trial court found that your petitioner had complied with every applicable provision of the Texas law, except the alleged requirement for a certificate and we most respectfully submit that that requirement, if it existed, has been entirely superseded by the Motor Carrier Act, 1935.

In connection with this argument, it is our further contention that the Railroad Commission of Texas has never had the authority under the Texas Motor Truck law to require of a purely interstate operator that he have a certificate of convenience and necessity or permit issued by the Railroad Commission, and if this contention be correct then obviously the decision of the Circuit Court of Appeals in this case is erroneous.

The fact that the Railroad Commission could not require of a purely interstate operator a certificate of public convenience and necessity was early made clear in a mass of litigation which followed the passage of the Texas Motor Truck Law. In the case of *Sage* v. *Baldwin*, 55 Federal (2d) 968 in which Judge Atwell, writing for a three-judge court, it is said:

"Preserving, therefore, the rights of the state and the right of the nation, the respondents will be enjoined from interfering with the operation of the complainants or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be con-

cerned, *or so far as any certificate of public convenience and necessity may be concerned.*" (Emphasis ours.)

The Railroad Commission of Texas in passing upon an application under the Texas Motor Truck law may not in any event require such applicant to prove convenience and necessity. That fact is well established in *Buck* v. *Kuykendall, supra; Bush* v. *Malloy, supra; Michigan Public Utilities Commission,* v. *Duke,* 266 U. S. 570; *Smith* v. *Cahoon,* 75 L. Ed. 1264, as well as the *Sage* v. *Baldwin* case, *supra, Galveston Truck Line* v. *Allen,* 2 Fed. Supp. 488, 53 Sup. Ct. 694.

The Railroad Commission of Texas has that power and only that power which has been delegated to it. *State* v. *Sugarland,* 163 S.W. 1047; *Harris* v. *Municipal Gas Company,* 59 S.W. (2d) 355; *Dancigar Oil & Rfg. Co.* v. *Railroad Commission,* 49 S. W. (2d) 837, and *Railroad Commission of Texas* v. *MacMillan,* 51 F. (2d) 400. The rule is stated in 34 Texas Jurisprudence 340, as "public officers and governmental and administrative boards possess only such powers as are expressly conferred upon them by law or are necessarily implied from the power so conferred." If there is any statute within the State of Texas which requires an interstate common carrier by motor vehicle to have any kind of a certificate or permit, it must be found in the Texas Motor Truck law, Art. 911(b), Vernon's Annotated Civil Statutes, 1925, Acts 1931, 42nd Legislature, p. 480, Ch. 277. This question may best be determined by assuming a criminal prosecution.

If an interstate operator without a certificate issued by the Railroad Commission of Texas is violating the law of the State of Texas, then where must he go to find the law. The Texas statutes provide in Art. 3 of the Penal Code as follows:

"Art. 3. Penalties must be affixed by written law. In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State."

Now we contend that there is no Texas law requiring an nterstate operator to have a certificate or permit from the tate of Texas.

Looking now to the written law of the State (Texas lotor Truck Law, Art. 911(b) and Art. 1690(b) of the enal Code), we find that common carrier motor carriers re required to have a *particular* kind of instrument and we nd that this *particular* kind of instrument is the *only* kind f an instrument that is required. The only provision in ne written law requiring a motor carrier to have any kind f an instrument in the form of a certificate of convenience nd necessity as a prerequisite to his right to operate in is State is found in Section 3 of Art. 911(b), *supra*, and at section in part reads:

"Section 3. No motor carrier shall after this Act goes into effect operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity *pursuant to a finding to the effect that the* public convenience and necessity require such operation," etc.

Thus, the law of this State contains only one obstacle a common carrier motor carrier's operation and that is e requirement that as a prerequisite to the exercise of e right he must obtain a certain, definite, and particular nd of an instrument from the Railroad Commission of

Texas, namely, a certificate; and this certificate must be of a particular kind, namely, a certificate of public convenience and necessity, and it must have been issued under particular conditions, namely, "*pursuant to a finding that the public convenience and necessity require such operation.*"

Otherwise, the statute is silent.

Suppose a criminal prosecution. We will suppose that the State of Texas desires to proceed against your petitioner here for operating over the highways of this State without having obtained that particular kind of an instrument which the statute requires. The complaint would necessarily have to be in substance that on or about a certain date your petitioner did then and there operate over a certain highway of this State as a common carrier motor carrier "without first having obtained from the Commission * * * *a certificate of public convenience and necessity, pursuant to a finding to the effect that public convenience and necessity require such operation.*" 1 Code Criminal Procedure, 1925, Art. 396.

Now the State could of course file such complaint and make such allegation, but it would be utterly unable to prove the allegations of the complaint and it would necessarily fall because, under the decisions cited hereinabove, the Commission can not require proof of convenience and necessity and never since the *Galveston Truck Line* case, 289 U. S. 708, 53 Sup. Ct. 694, 77 L. Ed. 1463 has the Railroad Commission of Texas ever attempted to require an interstate operator to prove convenience and necessity. The Railroad Commission of Texas is simply wholly without any authority to require of an interstate operator any form of certificate or permit.

Referring directly to the burden of the Circuit Court of Appeals argument, as set out in its opinion, we quote from

Hannibal & St. Joseph R. R. Co. v. *Husen*, 95 U. S. 527, 5 Otto 465:

> "Neither the unlimited powers of a state to tax nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences *and that which regulates or furnishes a rule of conduct.*" (Emphasis ours.)

To permit the States to have the final say as to when interstate commerce shall move over their roads as the Circuit Court of Appeals says in this case, would "work a practical assumption of the powers properly conferred upon Congress by the Constitution." That cannot be successfully disputed. To permit the States to have the final say as to when interstate commerce shall move over their highways as the Circuit Court of Appeals has said, would be for the States to set up and furnish the rule of conduct. This is no such case, therefore, as involves any difficulty in distinguishing between "that which merely affects or influences and that which regulates or furnishes a rule of conduct."

POINTS C and D.

Your petitioner, being in operation on June 1, 1935, and having filed his application within the time required by law, is entitled to continue to operate until his application is either granted or refused by the Interstate Commerce Commission.

Your petitioner filed his application with the Interstate Commerce Commission for an interstate certificate within the time fixed by the Motor Carrier Act, 1935 (R. 36), and

was therefore entitled to continue to operate until t
Interstate Commerce Commission either granted or deni
the application. This was a right directly conferred up
your petitioner by the affirmative language of Section 20
Motor Carrier Act, 1935, which Section provides that
common carrier by motor vehicle shall engage in intersta
or foreign commerce on any public highway unless su
carrier has a certificate of convenience and necessity issu
by the Interstate Commerce Commission, and then provid
that if any carrier or his predecessor in interest was
bona fide operation as a common carrier on June 1, 19
and filed an application within 120 days after Section 2
took effect that "pending the determination of any such a
plication the continuance of such operation shall be lawful
Your petitioner was, therefore, as a matter of law, entitl
to continue to operate until the application filed with t
Interstate Commerce Commission was either granted
denied. That is the construction which our own courts,
well as the courts of other States, have placed upon t
Texas Motor Truck Law and the Motor Carrier Act, 193
and exactly such a case as the case at bar was present
to the Supreme Court of Texas in *Greyhound Lines* ca
supra, and was presented to the Court of Civil Appeals
Texas in *Railroad Commission et al.* v. *Bates et al.*, 1
S. W. (2d) 286.

Without repeating, we here refer to quotations from tho
two cases found on pages 19 and 20 of this brief. T
Bates case, *supra*, held that the Motor Carrier Act, 193
vested the Interstate Commerce Commission with exclusi
authority to pass on applications of motor carriers engag
exclusively in interstate commerce on highways for ce
tificates of public convenience and necessity, and supe
seded the Texas Motor Truck Law. In that case it w
held that the State Railroad Commission need not gra
a certificate of convenience and necessity pending an a

plication to the Interstate Commerce Commission for permenent certificate, notwithstanding the fact that such a carrier could continue already begun interstate operations. It also held that the Texas Railroad Commission could not require a motor carrier engaged exclusively in interstate commerce to obtain a State certificate or permit during the pendency of such application to the Interstate Commerce Commission for certificate of convenience and necessity.

In the *Bates* case the Court of Civil Appeals affirmed a temporary injunction granted by the District Court of Travis County enjoining the Railroad Commission of Texas and its agents from interfering with Bates in the operation of twelve trucks carrying exclusively interstate commodities over certain highways in Texas, Bates having no Texas certificate or permit issued by the Railroad Commission. There, just exactly as petitioner here, Bates was operating trucks in interstate commerce over highways in Texas under and by virtue of his (Bates) application under the so-called grandfather provision of Section 206, Motor Carrier Act, 1935. In the *Bates* case, as here, the respondents contended that notwithstanding the Motor Carrier Act, 1935, the Texas Commission had authority and jurisdiction to require motor carrier common carriers engaged in carrying interstate commodities exclusively to apply for and obtain certificates of convenience and necessity from the State Commission and that the State Commission still had the authority to deny such certificates or permits, if necessary, for the protection of the State's highways, or for the safety of the public in the use of them. In direct reply to this contention, the Court of Civil Appeals at Austin said:

> "This question was necessarily decided against the contention of appellants by the Supreme Court in the case of *Southwestern Greyhound Lines* v. *Railroad Commission*, 99 S. W. (2d) 263."

In *State ex rel L. & L. Freight Lines, Inc.*, v. *Douglass*, *supra*, the Supreme Court of Florida, said:

> "The holding of this court in the last cited case is that, since the enactment of the Federal Motor Carrier Act of 1935, Congress has vested in the Interstate Commerce Commission of the United States sole and exclusive jurisdiction to investigate and determine the necessity for an interstate motor carrier operation; that it is possessed of exclusive authority to initially grant a certificate of public convenience and necessity to engage in such exclusive motor carriage operation. This being true, the Railroad Commission has no jurisdiction whatsoever in the matter of granting or denying applications for certificates of public convenience and necessity for exclusively interstate motor carrier operations until the interstate motor carrier applicant shall have first applied for and obtained from the Interstate Commerce Commission a federal certificate of public convenience and necessity for the operation of motor vehicles exclusively in interstate commerce. In the last mentioned instance, the Railroad Commission of Florida, after the award of certificate of public convenience and necessity by the Interstate Commerce Commission, is required to grant to a carrier upon proper application therefor a state certificate which will enable the Florida Railroad Commission to enforce against the interstate operation all of the police regulations applicable to the same which are required to be enforced pursuant to the terms of the State law in the premises."

Notwithstanding the Commerce Clause of the Federal Constitution and notwithstanding the well-known fact that the Federal Government has expended for the construction in Texas of a system of Federal Highways a vast sum of money, the appellants insist here in their brief that Texas owns such highways and has the right, irrespective of the Act of Congress, to exercise the jurisdiction of saying to an interstate carrier whether such roads are in

uch condition physically and whether the amount of traf-ic thereon is such as to authorize interstate operation, as f the States had not in the Commerce Clause many years go, dedicated their highways and rivers to the unob-tructed flow of interstate traffic under the exclusive regu-ation and control of Congress.

Even if the State itself had furnished every dollar for he construction of the roads used by petitioner here, such ight to stop McDonald would not exist in the State, let lone in an administrative agency of the State deriving ts power solely from statutory enactment. A complete nswer to appellants' contention, we believe, is set forth in he opinion of Circuit Judge Parker in the three-judge ase of *Barnwell Bros.* v. *South Carolina State Highway Department, supra,* and in that case Judge Parker said:

> "Under our dual governmental system the control of the highways is committed to the states, whereas the control of interstate commerce passing over those highways is committed to the Federal Government; and since the decision in *Gibbon* v. *Ogden* it has been settled that the states may not in their control of the highways burden or interfere with the free flow of interstate commerce, the regulation of which has been entrusted to Congress. This would not be doubted if the highways in question were a navigable river, but the principle is the same whatever the character of the highway over which the interstate commerce moves. Thus, the federal power extends over artificial waterways constructed by the states and over a railroad handling cars moving in interstate commerce, although the railroad has been constructed and is being operated by one of the states (*U. S.* v. *State of California,* 297 U. S. 175, 56 Sup. Ct. 421, 80 L. Ed. 567). And when a state builds *a road as a highway of commerce, it cannot burden the flow over it of commerce interstate in character* (citing cases). (Emphasis ours.) (Reversed but not on this holding.)

In *State ex rel. R. C. Motor Lines* v. *Florida Railroad Commission,* 123 Fla. 345, 166 So. 840, the Supreme Court of Florida said:

> "Under the United States Constitution, the commerce clause (clause 3, sec. 8, art. 1) *ex proprio vigore* amounts to a national certificate of public convenience and necessity for the free and untrammelled carrying on by every one of interstate commerce, and of interstate carriage pertaining thereto, and only Congress has the legislative power to prescribe special conditions, limitations, and restraints upon the *prima facie* constitutional right of every person to freely engage in interstate commerce as a matter of national convenience and necessity for the welfare of the Union, absent any special federal legislative provisions of law providing for the special licensing of particular individuals to carry on such interstate commerce or conduct carriage operations pertaining thereto."

Inasmuch as it seems obvious that the Motor Carrier Act, 1935, superseded the Texas Motor Truck Law, in so far as any requirement for certificate or permit of any kind is concerned, then it seems equally obvious and must follow as a matter of course, that your petitioner was entitled to the benefit of the right conferred upon him by Section 206 Motor Carrier Act, 1935, and was entitled to continue to operate over the highways until the Interstate Commerce Commission had passed upon his application and had either granted or denied it. The trial court was therefore manifestly correct in granting its permanent injunction against the respondents here, together with all their agents, servants, or representatives, and in permitting your petitioner to continue to exercise the right and enjoy the benefit of the right conferred upon him by the Act of Congress known as the Motor Carrier Act, 1935.

Jurisdiction having attached in the Interstate Commerce Commission, it was exclusively in the province of that

Commission to pass upon the question of the *bona fides* of your petitioner's application and to either grant or refuse him a certificate of convenience and necessity. *Great Northern Ry. Co.* v. *Merchants Elevator Company,* 259 U. S. 285, 42 Sup. Ct. 477, and cases annotated at page 480 of the Supreme Court Reporter. *Atlantic Coast Line Ry. Co.* v. *Hampton,* 80 Fed. Sup. 797 (800-801). Incidentally, it may be said that the Interstate Commerce Commission, through its Joint Board, has found that your petitioner here was in *bona fide* operation on June 1, 1935, and continuously since, and has recommended the entry of an order granting your petitioner a certificate of convenience and necessity. The trial court found that your petitioner was in *bona fide* operation on June 1, 1935 (R. 38).

It may also be very frankly stated here, that there is no dispute about any of the facts established in this case—the respondents here simply contend that your petitioner was not in *bona fide* operation, although actual operation and actual compliance with all police requirements were not disputed, except on the ground that your petitioner had no certificate or permit issued by the Railroad Commission of Texas, and the respondents here contend that your petitioner could not lawfully operate unless he had a State certificate. We do not think the question of the *bona fides* of petitioner's operation in Texas is a matter to be considered by this Court, *Great Northern Ry. Co.* case, *supra,* and *Atlantic Coast Line Ry. Co., supra,* but if the question of the *bona fides* of petitioner's operation is regarded as of any importance, then we could not nearly argue that case so well as it has been determined by the Interstate Commerce Commission in *In re Slagle* case, 2 M. C. C. 127, and in which the Commission found that compliance with State laws was not essential to a *bona fide* operation and in which Slagle was granted a certificate by the Commission authorizing his operation.

There is no question in this case concerning such ordinary police requirements as weight of load or other requirements of Texas laws regarding safety of equipment. There never was any such question in this case. Neither is there any question here as to the right of your petitioner to operate except as that right may be determined by some official action of the Interstate Commerce Commission upon the application before it.

WHEREFORE your petitioner prays that the petition for *certiorari* be granted; that the judgment of the Circuit Court of Appeals be in all things reversed, and that of the trial court herein be in all things affirmed.

T. S. CHRISTOPHER,
LLOYD E. PRICE,
Attorneys for Petitioner.

APPENDIX A.

Texas Motor Truck Law, Acts 1931, 42nd Legislature, page 480, chapt. 277:

COMPLIANCE WITH ACT BY MOTOR CARRIERS.

SEC. 2. No motor carrier, as defined in the preceding section, shall operate any motor propelled vehicle for the purpose of the transportation or carriage of property for compensation or hire over any public highway in the State except in accordance with the provisions of this Act; provided, however, that nothing in this Act or any provision thereof shall be construed or held to in any manner affect. limit or deprive cities and towns from exercising any of the powers granted them by Chapter 147, pages 307 to 318, inclusive, of the General Laws of the State of Texas passed by the 33rd Legislature or any amendment thereto.

CERTIFICATE OF CONVENIENCE AND NECESSITY.

SEC. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of public convenience and necessity pursuant to a finding to the effect that public convenience and necessity require such operation. No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act.

SUPERVISION AND REGULATION BY COMMISSION.

SEC. 4. (a) The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provision

herein contained, to prescribe all rules and regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly, annual, and other reports and other data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not.

ART. 1690a. VIOLATION OF ORDERS (PENAL CODE).

(a) Any officer, agent, servant, or employee of any corporation and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provisions of this Act (Civ. St. Art. 911a; P. C. 1690a) shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed Five Hundred ($500.00) Dollars, or by punishment in the county jail not exceeding one year, or by both such fine and imprisonment; and the violations occurring on each day shall each constitute a separate offense.

(b) Any officer, agent, servant, or employee of any motor bus company as heretofore defined, and any motor bus company as heretofore defined and/or the owner or operator, officer, servant, agent or employee, or any such owner or operator of any bus terminal who violates or fails to obey, observe or comply with any order, decision, rule, or regulation, direction, demand or requirement of the Commission shall be subject to and shall pay a penalty not exceeding Five Hundred ($500.00) Dollars, for each and every day of such violation. Such penalty to be recovered in any court of competent jurisdiction in Travis County, Texas, or in the County in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the county or district attorney of the county in which the violation occurs, in the name of the State of Texas, and by direction of the Railroad Commission of Texas.

(c) Upon the violation of any provisions of this Chapter, or upon the violation of any rule, regulation, order or decree of the Commission, promulgated under the terms of this Act (Civ. St. Art. 911a; P. C. 1690a), any district court of Travis County, Texas, or any district court of any county where such violation occurs, shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act (Civ. St. Art. 911a; P. C. 1690a), or from violating the rules, regulations, orders and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission or upon the application of any person authorized by it to act, or upon the application of any "motor bus company" holding a certificate of convenience and necessity over the route affected, and against any "motor bus company" violating the provisions of this Act (Civ. St. Art. 911a; P. C. 1690a) and not holding a certificate over such route and attempting to operate or operating over said route. Such relief may be granted in suits for penalties as provided in sub-division (b) of this Section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this Section.

(d) Any authorized inspector for the Commission shall have the power and authority to make arrests for the violation of this Act (Cv. St. Art. 911a; P. C. 1690a), coming under his observation, but such authority to make arrests shall be confined solely to the violations of this Act (Civ. St. Art. 911a; P. C. 1690a), provided, further that it shall be the duty of all law enforcement officers of this State to enforce the provision of this Act.